

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

BUFFALO JET CENTER, INCORPORATED)	
v)	Docket No. 16-98-01
NIAGARA FRONTIER TRANSPORTATION)	
AUTHORITY)	

RECORD OF DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with the FAA Rules of Practice for Federally-Assisted Airport Proceedings (FAA Rules of Practice), 14 CFR Part 16.

Buffalo Jet Center, Incorporated (hereinafter, BJC), the complainant has filed a formal complaint, pursuant to 14 CFR Part 16, against the Niagara Frontier Transportation Authority (hereinafter, the NFTA), owner of Buffalo Niagara International Airport (BUF), alleging that the NFTA is engaged in granting an exclusive right contrary to its Federal grant assurances by refusing to consider complainant's proposal to operate a fixed base operation (FBO) at BUF.¹

BJC, Inc., is a New York corporation with its offices at 159 Linwood Avenue, Buffalo, New York, 14209. The company was incorporated on July 17, 1996; its principal officers are Daniel P. Drew and Dean M. Drew. The complaint presents the following issues for decision:

Whether the Niagara Frontier Transportation Authority by granting Prior Aviation Service, Inc., the right to provide fixed base operator services on BUF, while withholding that same right from Buffalo Jet Center, Inc., and offering a counterproposal to Buffalo Jet Service, Inc. is violating its federal obligations regarding exclusive rights as set forth in its Airport Grant agreements for each fiscal year for the period 1986 through 1997 or in violation of its Federal obligations regarding exclusive rights at an air navigation facility as set forth in 49 U.S.C. § 40103(e).

¹ A "fixed base operator (FBO) is an individual or firm operating at an airport and providing general aircraft services such as maintenance, storage, ground and flight instruction. FAA Order 5190.1, Airport Compliance Requirements, Appendix 5 (1989)."

As discussed below, the FAA has determined that NFTA, by offering a counterproposal to Buffalo Jet Service, Inc., is not in violation of its federal obligations regarding exclusive rights as set forth in its Airport Grant agreements for each fiscal year for the period 1986 through 1997, or its Federal obligations regarding exclusive rights at an air navigation facility as set forth in 49 U.S.C. § 40103(e).

This Determination constitutes the determination of the Director, FAA Office of Airport Safety and Standards, pursuant to 14 C.F.R. 16.31. The determination is based on our investigation of this matter pursuant to 14 C.F.R. 16.29, as presented in the pleadings and supporting documentation submitted by the parties in light of the applicable law and policy. See Index of Administrative Record.²

II. THE AIRPORT

Buffalo Niagara International Airport (BUF) is a public-use airport owned and operated by the NFTA. It is located in Buffalo, New York, five nautical miles northeast of the central business district. The airport is certificated under 14 CFR Part 139. Seven air carriers serve the airport. The airport had 55 based aircraft and 149,024 operations for a twelve-month period ending 24 July 1997.³

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the former Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. § 47101, *et seq.* Since 1982, the Airport Sponsor has executed 36 AIP grant agreements with the FAA and has received a total of \$87,402,918 in federal airport development assistance. In 1998, the Airport Sponsor received its most recent AIP grant for \$2,007,055⁴

III. BACKGROUND

Prior Aviation Service, Incorporated

On November 1, 1969, the NFTA signed an agreement with Prior Aviation Service Incorporated (Prior) for general aviation support services and facilities at BUF. [Exhibit 1, Item 6(a), exhibit B].

² FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

³ FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

⁴ FAA Exhibit 1, Item 2 provides the Airport Sponsor's AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor from 1982 to the Present.

The ten-year agreement allowed Prior to provide two class of services: primary commercial support services and secondary commercial services. Primary commercial support services consist of those services directly related to the support of general aviation aircraft such as aircraft fueling, aircraft maintenance, parking and storage. Under the category of secondary commercial service, Prior may provide any number of services not classified as being in direct support of general aviation aircraft. These services could include among others, aircraft sales, avionics, aircraft charter, and flight instruction.

The lease required Prior to construct, at its own expense, an aircraft hangar, (Hangar 1), on the north side of the airport at a cost of not less than \$300,000. As a part of the agreement, NFTA agreed to provide lighted taxiways supporting 100,000 pounds gross weight, a lighted access roadway, electrical power, water, storm and sanitary sewer lines. **[Exhibit 1, item (b), exhibit b].**

The agreement included language that specifically stated that by permitting Prior to provide aircraft related service, the airport was not granting an exclusive right. To protect Prior's rights, the NFTA also included the following language:

"However, the Authority does covenant and agree that it will protect Prior from unreasonable and unfair competition from others with respect to the primary commercial support services, defined in the foregoing, by requiring that future operators, as a condition precedent to obtaining such rights and privileges, must agree to provide services, facilities, and operating equipment, which in the judgement of the Authority are reasonable comparable to those initially contemplated by this Agreement to be provided by Prior for these services. In Addition, any future operator granted the right to render primary commercial support services will not be permitted to operate at the Airport under more favorable rates, terms, and conditions than set forth herein." **[Exhibit 1,item (b), exhibit b].**

In 1982, as part of an airport master plan study, the NFTA adopted an airport layout plan (ALP) that provided for the segregation of general aviation, air carrier and air cargo activity into separate areas of the airport. This decision was made in order to enhance the safety features and operational characteristics of the airport and improve the gateway image of the airport. **[Exhibit 1, item 6(a), para.3].**

Under the plan, air cargo activities would be located on the west side of the airport, general aviation on the north side and air carrier operations on the south side of the airport.⁵

At the time of the 1982 ALP revision, Prior was using facilities on both the north and south sides of the airport. In addition to its own hangar on the north side, Prior was leasing an NFTA owned hangar (called BAC hangar) on the south side of the airport. The NFTA instructed Prior to vacate the BAC hangar by June 15, 1987 to allow for demolition of the hangar as indicated on the 1982 ALP and as part of the consolidation of general aviation activities on the north side of the airport.

On August 29, 1986, the NFTA and Prior signed a sale-purchase and lease agreement. NFTA leased Prior land on the north side of the airport for the construction of a second hangar (Hangar 2). Construction of the second hangar did not require Prior to provide a minimum investment, or submit size requirements, and a construction schedule. As part of the agreement, Prior agreed to sell Hangar 1 to the NFTA. In return, the NFTA leased Hangar 1 and the associated land to Prior under a 20-year agreement. NFTA also agreed to purchase Prior's interest in the fuel farm for \$85,000. **[Exhibit 1, item 3 (B)(1)].**

On October 17, 1986, Prior signed a twenty-year agreement ("the basic lease") that governs the type of services that Prior must provide. The agreement requires the construction of the second hangar. An October 29, 1987, addendum to the basic lease provided additional property consisting of approximately 138,635 square feet, (58,960 sqft undeveloped area/79,675 sqft developed area). The NFTA, at its sole expense, agreed to construct and maintain the paved developed area. A December 1, 1990, addendum leased an additional 60,000 square feet, (25,000-sqft two-story building/35,000 sqft paved area). **[See Exhibit 1, item 3(B)(5)].**

To accommodate Prior's general aviation tenants that were displaced due to the demolition of the BAC hangar, NFTA approved, on an interim basis, a sublease of the Bay 7 hangar space between Prior and Sierra Research. Sierra Research is a corporate tenant on the airport involved in the manufacturing and installation of aircraft guidance and flight inspection systems. Sierra imposed a number of restrictions that limited the type of activities that Prior could conduct in the hangar: Prior could use the hangar for aircraft storage; only designated pilots were allowed access to the hangar; passenger loading and unloading was prohibited on the premises; and finally, engine changes or major repairs/overhauls were prohibited. According to the NFTA, Prior used the hangar as an ancillary facility to its main operation. NFTA approved the original

⁵ According to the NFTA's current ALP, the segregation of aeronautical activities has been substantially complete. [see Exhibit 1, item 6(a), page 5].

lease dated June 15 1987, for a 6-month period.⁶ However, over the years, according to the NFTA, Prior has used the facility to store aircraft belonging to USAirways regional carriers. [Exhibit 1, item 3 (B)(2) and (6)].

Minimum Standards Adopted

On May 22, 1995, the NFTA's Board of Commissioners adopted and enacted the Minimum Standards and Qualifications for Aviation Activities (MSAQ) for the Greater Buffalo International Airport (GBIA)⁷. According to the board resolution,

"The MSAQ provides for needed uniform operating policies and procedures for operators conducting airside services and business activities at GBIA. Additionally, the MSAQ provides NFTA a mechanism to identify and control current and future operators of these services and activities, and requires operators conduct their activities in accordance with a written agreement with the Authority." [See Exhibit 1, item 6(a), exhibit e].

The standards establish three classes of operators, general aviation full service operator, aviation ground support service operator, and non-tenant cargo operator.⁸ General aviation full service operators are further divided into primary commercial support and secondary commercial services. The standards require all general aviation full service operators to sign a written agreement with the NFTA for each service or operation it wants to provide. A general aviation full service operator must provide the primary commercial support services, as a minimum. It may elect to provide any number of secondary commercial services. The standards also establish service standards for equipment, operation, staffing and training, the collection of fees, facilities, and their location. Specifically, the standards require:

"The operator shall lease from the NFTA an area of appropriate acreage of ground space on which the operator shall provide and maintain a building satisfactory to the NFTA, and an appropriate square footage of floor space adequately proportioned for aircraft maintenance and storage, office, pilot and customer lounge and

⁶ BJC provided a copy of an unexecuted agreement between Prior and Sierra for a six month term beginning January 15, 1995, that essentially consists of the same terms and conditions as the June 15, 1987, agreement. According to the NFTA, Prior did not execute this later agreement.

⁷ On November 3, 1997, Greater Buffalo International Airport changed its name to Buffalo-Niagara International Airport

⁸ The MSQAS defines a General Aviation Full Service Operator as an individual or firm operating under contract at BUF, providing general aviation aircraft services, such as sale and uplift of aviation fuel, ramp assistance, maintenance, hangaring, parking, ground and flight instruction, ground support, and other subsidiary services as required in the performance of general aviation aeronautical activities.

restrooms, which the operator shall properly heat and light at the operator's expense." [Exhibit 1, item 3(B)(4)].

No minimum investment amount is identified in the standards. The standards also identify the location that the facilities are to be constructed.

"The facilities are to be located as defined in the GBIA master Plan as may be amended from time to time." [Exhibit 1, item 3(B)(4)].

The standards also define the three ramp areas supporting the three class of operators: (1) General Aviation Full Service Operator Ramp, located on the north side of the airport designated on the ALP for general aviation development; (2) Air Carrier Terminal Ramp, located on the south side of the airport for air carrier operations; (3) Air Cargo Complex, located on the west side for major air cargo operations. The NFTA's segregation of aeronautical activities requires general aviation activity take place on the General Aviation Full Service Operator Ramp. Aviation ground support services operators conduct their business on the Air Cargo Complex Ramp or Air Carrier Terminal Ramp. Finally, non-tenant cargo operators conduct their business on the Air Cargo Complex Ramp or General Aviation Ramp depending on the size of the aircraft.

BJC Proposal

On August 19, 1996, BJC submitted a proposal to the NFTA to operate a full service fixed base operation at BUF. BJC proposed the following start-up services:

- Fuel and line service for aircraft based at BUF and itinerant aircraft;
- Hangar and tie down for aircraft based at BUF and itinerant aircraft;
- General aviation passenger terminal
- Corporate flight department offices;
- Corporate flight department and aircraft management;

BJC's additional planned services included:

- Aircraft maintenance;
- Aircraft catering;
- Aircraft sales and leasing;
- Aircraft on-demand charter service.

BJC proposed to provide the additional planned services sometime after the FBO operation began. To provide these services, BJC proposed to sublease hangar, ramp, automobile parking, and office space from Sierra Research

Division, a division of Sierra Technologies, Incorporated, and a corporate tenant on BUF. On June 21, 1996, BJC signed a letter of intent with Sierra for the use of a portion of Sierra Building #3, known as Bay 7. Sierra's facilities were located on the south side of the airport. The south side was not designated for general aviation development according to the 1982 ALP revision.

BJC planned to convert some of the existing Sierra Research office and electronics laboratory space to a general aviation use. Other minor alterations to the building and ramp would also be required to accommodate fixed base operations. **[Exhibit 1, item 3(B), exhibit 8].**

The August 19, 1996, proposal called for providing aircraft maintenance for selected aircraft types after the opening of the FBO.

"Buffalo Jet Center intends to pursue aircraft maintenance after the operation is opened for business. Initial maintenance services will be aircraft type specific and the aircraft types selected will most likely be those of corporate hangar lessees of Buffalo Jet Center and of other popular general aviation types currently in use such as Beech C-90, B-200 and Cessna C-500/550/551".

[Exhibit 1, item 3(B), exhibit 8].

BJC proposed a sub-lease term of 1 year with an option for two 1-year terms and annual rental payments of \$161,500 for the first year, \$170,000 for the second year and \$178,500 for the third year. All rental payments would be made in equal monthly installments.

BJC believed it would need bigger facilities within a three-year period. BJC viewed two possible options to expansion: One option is a partial sublease of Bay 6 in Sierra Building #3; another option was the construction of additional hangar and office facilities on the airport. If a new facility were constructed, BJC would continue to use Bay 7. BJC proposed a start-up date of January 1 1997, pending NFTA's final approval by November 22, 1996.

Exhibit 1, item 3(B)(8)].

BJC's Conformance with Existing Leases⁹

As previously mentioned the NFTA's current lease with Prior Aviation Services requires that any future operator granted the right to render primary commercial support services will not be permitted to operate at the airport under more favorable rates, terms and conditions. In its August 19, 1996, proposal, BJC argues that its proposal provides for terms and conditions that are substantially less favorable than those enjoyed by the existing FBO. According to BJC:

⁹ See Exhibit 1, item 3(B), exhibit 8, Section XIII. Conformance With Existing Leases. Page (18) 210

- A comparison of investment must be based upon BJC's sublease of the Sierra Building #3 facilities compared to Prior Aviation Services Hangar 1. BJC believes Prior's Hangar 1 is considerably smaller than the Sierra facilities. BJC also argues that Prior's expansion into its second and third buildings should not be included into a comparison of investment, since the expansion was for Prior's own interest and convenience.
- BJC also argues in a comparison of investment that Sierra's investment must also be considered. According to the BJC proposal, Sierra invested \$2,500,000 in improvements to the hangar. BJC's rental payments to Sierra reflects this investment. Prior paid \$14,175, annual ground rental lease to the NFTA, compared to BJC payments of \$161,500, \$170,000 and \$178,500 to Sierra, respectively, for a three-year period.
- BJC's position is that the "terms and conditions" was intended to refer to (1) rental amounts and (2) provision of required services not to a comparison of investment.
- BJC argues to interpret the "terms and conditions" clause in the lease with the existing FBO would be to grant a de facto exclusive privilege on BUF. No one could justify entering the FBO business at BUF, if it were required to invest the total amount of investment by the existing FBO.

NFTA's Response

According to David M. Gregory, Acting Director of Aviation for NFTA, BJC's proposal lacked sufficient detail for NFTA to evaluate the proposal. [Exhibit 1, item 4(a) para.4].

In the NFTA's September 20, 1996, response to the proposal, it raised some technical concerns and issues on business arrangement. One issue concerned the term of the sublease. BJC proposed to have a one-year sublease with Sierra with two additional one-year term options at BJC's discretion. NFTA had concerns about the short term of the lease considering the capital and operating expense requirements of the project. To address the NFTA's concern, BJC and Sierra later extended the sublease to coincide with the remaining term of the lease between Sierra and the NFTA. According to complainant, there were approximately four years remaining on the Sierra lease. [Exhibit 1, item 36].

The NFTA also requested revenue, capital and operating expense projections for the initial five years of operation, and information on the financial ability of the company. Mr. Gregory also expressed a need for a meeting to further discuss the proposal. During the period from August 1997 to December 1997, the BJC and NFTA exchanged correspondence and met five times, in an effort to clarify and supplement BJC's proposal. **[Exhibit 1, item 4, para. 9].**

During the period September 1996 through March 1997, most of the written correspondence concerned BJC's ability to provide the required services and facilities. Between April 1997 and June 1997, the correspondence concerned financial projections and the compensation due the NFTA under the agreement.

In response to NFTA inquiries, BJC provided a number of documents for NFTA's review and analysis. This included information on revenue and expense projections, copies of its sublease, marketing data, and information on compensation. **[See Exhibit 1, item 3(B)].**

In the fall 1997, the NFTA hired John P. Kennedy, a principal of Airport Corporation of America, to evaluate the BJC proposal and determine whether the proposal complied with the minimum standards and the approved Airport Layout Plan. **[See qualifications, Exhibit 1, item 4, exhibit (b), attached exhibit A].**

Mr. Kennedy recommended that the NFTA not approve the BJC proposal because it was inconsistent with the NFTA's Minimum Standard and Qualifications for Aeronautical Activities. Mr. Kennedy's reasons for recommending against approval of the proposal were based upon the fact that: 1.) BJC failed to locate its proposed operation in accordance with the airport master plan, as required by the minimum standards¹⁰; 2.) BJC, by subleasing land from Sierra Research for its FBO operation, failed to execute a lease directly with the NFTA, as required by the minimum standards; and 3.) BJC did not initially propose to provide aircraft maintenance required by the minimum standards. According to Mr. Kennedy, while the NFTA would have been justified in rejecting the BJC proposal, NFTA decided to work with BJC to develop a proposal that would satisfy the requirements of the minimum standards. **[Exhibit 1, item 6, exhibit (b)].**

On October 17, 1997, representatives of NFTA and BJC met to further discuss open items of the BJC proposal. The open items included: 1) the amount of BJC's license payments to the NFTA; 2) an aircraft maintenance plan that would

¹⁰ There are approximately 11 acres available in the general aviation area on the north side of the airport for use by BJC.

comply with the minimum standards; 3) the construction of an FBO facility; and 4) a commitment by BJC to construct an FBO facility. BJC did express a willingness to meet the requirements outlined at the October 17 meeting, in principal. Furthermore, BJC did agree in concept to constructing a facility. Not discussed at the meeting, was the fact that BJC wanted to construct the facility adjacent to the south side of the Sierra Building to allow its FBO operation to be maintained in a single area. **[Exhibit 1, item 3(B)(38)] [Exhibit 1, item 5(b) para. 23].**

On November 12, 1997, BJC submitted an aircraft maintenance plan that would service all general aviation aircraft. In its August 19, 1996, proposal, BJC had planned to provide aircraft maintenance for selected aircraft types at a future time after the start-up of service. The November 12 plan proposed to service all general aircraft types as a part of the initial start-up of the BJC operation. This plan was acceptable to the NFTA to meet the minimum standards relating to aircraft maintenance services.. **[Exhibit 1, item 5(b) para. 23].**

NFTA Counterproposal

At a meeting on December 9, 1997, the NFTA advised BJC that it was rejecting the BJC proposal. NFTA offered BJC a counterproposal, in the form of a draft agreement, that permitted BJC to begin operations at the airport as a general aviation full service operator while making the transition to full compliance with the minimum standards over a three year period.

The NFTA counterproposal permitted BJC to conduct its fixed base operation from the Sierra Research leasehold for a period not to exceed three years. In return for the right to operate from the Sierra leasehold, BJC had to fulfill certain requirements, these included:

1. Before the approval of the agreement, BJC must submit a detailed plan demonstrating how it will comply with the requirements of the primary commercial support services outlined in the minimum standards. BJC also must explain how it will provide routine and special aircraft maintenance services with aircraft maintenance services performed with BJC employees.
2. BJC must also submit a detailed implementation plan and schedule for the relocation of its fixed base operation to the 11 acre site reserved for general aviation development on the north side of the airport. NFTA indicated that the site location was non-negotiable. The plan must include:
 - A site plan showing the location and layout of facilities including aircraft and vehicle parking, shop, office,

lounge, and an aircraft hangar not less than 25,000 sq. ft. (125' deep x 200' wide) with a clear door height of 28 feet. The plan is subject to approval of the NFTA;

- A time schedule identifying design, construction, and occupancy of the premises;
- A budget for construction of the facilities and certification by BJC that it has the financial resources to implement the plan.

3. BJC must agree to enter into a lease agreement with the NFTA encompassing the provisions regarding primary commercial support services and the construction of new facilities as outlined in section 4 of the draft agreement dated 5 December 1997.

4. BJC must comply with the timetable for its implementation of the site plan. In the event, BJC does not adhere to the timetable, NFTA has the right to immediately cancel the agreement.

[Exhibit 1, item 3 (B)(39)].

BJC's Opposition to the Counterproposal

BJC argues that the counterproposal does not constitute a legal counter-offer due to the fact that the proposal was:

1. not authorized by the board of commissioners of the Respondent and therefore conditional in nature;
2. so vague and ambiguous as to render compliance with its terms impossible;
3. discriminatory in that it precluded BJC from competing with Prior on a level playing field; and
4. discriminatory in that it precluded BJC from engaging in the same activities and on the same terms that were allowed to Prior.

[See Exhibit 1, item 5].

BJC found the terms of the counterproposal unacceptable. BJC also views the counterproposal as a basis for the NFTA to further delay BJC from operating on the airport. Other objections fall into three broad categories, BJC alleges:

- The minimum standards established by the NFTA are unreasonable, arbitrary and capricious.
- NFTA's application of the minimum standards to BJC's proposal was unreasonable, arbitrary and capricious.

- The conditional counterproposal offered by NFTA to BJC is so vague and ambiguous as to constitute discriminatory arbitrary and capricious action in violation of 49 USC section 40103(e).

Finally, BJC argues that the close association between an NFTA board member and the existing FBO gives rise to the appearance of an impropriety and might explain why the NFTA has failed to address the BJC proposal. According to the Affidavit of Dean Drew, Mr. Luis Kahl, Chairman of the NFTA board, is a close friend of Mr. Reginald Newman, a local refiner and distributor of petroleum fuel products. Mr. Newman and his brother, Donald F. Newman are also majority shareholders of Prior and a fuel supplier of Prior.

[Exhibit1, item 5(b), para. 53 to 56.].

According to both parties, BJC never informed the NFTA that it had rejected its counterproposal before submitting a complaint with the Federal Aviation Administration. BJC did request additional information on the counterproposal before filing a complaint with the Federal Aviation Administration on January 26, 1998.

Applicable Federal Law and FAA Policy

The Federal role in civil aviation has been augmented by various legislative actions, which authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public fair and reasonable access to the airport.

The Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110, and the Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the Federal Aviation Administration (FAA) must receive certain assurances from the airport sponsor.

49 U.S.C. 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree. These sponsorship requirements, or assurances, are included in every airport improvement grant agreement as set forth in

FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a contractual obligation between the airport sponsor and the Federal government.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations which an airport owners accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6A, Airport Compliance Requirements (Order) issued October 3, 1989, sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling of airport sponsor conduct, rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters, absent the filing of a complaint under FAA Rules of Practice for Federally-Assisted Airport Proceedings (14 CFR Part 16), continue to be set forth in the predecessor order, FAA Order 5190.6 issued August 24, 1973, and incorporated by reference in FAA Order 5190.6A. See FAA Order 5190.6, Sec. 5-3, and FAA Order 5190.6A, Sec. 6-2. FAA Rules of Practice for Federally-Assisted Airport Proceedings (14 CFR Part 16) were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996.

Public Use of the Airport

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination.

Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and provides, in pertinent part, that the sponsor of a federally obligated airport :

will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses. Assurance 22(a)

may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. Assurance 22(h)

may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. See FAA Order 5190.6A, Sec. 4-7(a). This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers", of the prescribed sponsor assurances implements the provisions 49 U.S.C. 47107 and requires, in pertinent part, that the sponsor of a federally obligated airport

"...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

FAA Order 5190.6A describes the responsibilities under Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

The Prohibition Against Exclusive Rights

49 U.S.C. 40103(e), provides that there shall be no exclusive right to use an air navigation facility upon which Government funds has been expended. Under 49 USC 47107(a)(4) a person providing aeronautical services to the public may not be given an exclusive right.

Assurance 23, "Exclusive Rights", of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport

will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

In FAA Order 5190.1A, Exclusive Rights, (1989) the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose terms and conditions of use upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. See Order, Ch. 3.

Airport Layout Plan

Assurance 29, "Airport Layout Plan," implements 49 U.S.C Section 47107(16) and, in pertinent part, requires the airport owner to "keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of the facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport."

An airport layout plan (ALP) depicts the entire property, current facilities, and plans for future development of the airport. The FAA requires an approved ALP

as a prerequisite to the grant of Federal funds for airport development. FAA approval of the ALP represents the concurrence of the FAA in the conformity of the plan to all-applicable airport design standards and criteria. Any construction, modification, or improvement that is inconsistent with the ALP requires FAA approval of a revision to the ALP. See Order, Sec. 4-17(a).

Fee and Rental Structure

Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of, 49 U.S.C. 47107(a)(13). It provides, in pertinent part, that the sponsor of a federally obligated airport "agrees that it will maintain a fee and rental structure consistent with Assurance 22 and 23, for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport."

FAA Order 5190.6A describes the responsibilities under Assurance 22, Economic Nondiscrimination, and Assurance 23, Exclusive Rights, assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on fair and reasonable terms without unjust discrimination and without granting an exclusive right of use. See Order, Secs. 4-14(a)(2) and 3-1.

The obligation of airport management to make an airport available for public use does not preclude the owner from recovering the cost of providing the facility through fair and reasonable fees, rentals or other user charges which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. See Order, Sec. 4-14(a).

Each commercial aeronautical activity at any airport shall be subject to the same rates, fees, rentals and other charges as are uniformly applied to all other commercial aeronautical activities making the same or similar uses of such airport utilizing the same or similar facilities. See Order, Sec. 4-14(a)(2).

FAA policy provides that, at general aviation airports, variations in commercial aeronautical activities' leasehold locations, leasehold improvements, and the services provided from such leasehold may be the basis for acceptable differences in rental rates, although the rates must be reasonable and equitable. See Order, Sec. 4-14(a)(2)(c).

Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to

impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be fair, equal and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. See FAA Order 5190.6A, Sec. 3-12.

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport, and such determination is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or whether the standard results in an attempt to create an exclusive right. See Order, Sec. 3-17(b).

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. See Order, Sec. 3-17(c).

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

ANALYSIS AND DISCUSSION

Summary of Issues and Arguments

Buffalo Jet Center, Inc. (BJC), alleges that the NFTA is engaged in granting an exclusive right to Prior Aviation Services, Inc., by granting it the right to conduct general aviation fixed base operator services and withholding that same right from the complainant.

BJC alleges that the NFTA violates its grant assurances in each year 1986 through 1997, inclusive, and section Title 49 U.S.C. Section 40103(e) by: (i) enacting minimum standards that are unreasonable, arbitrary, and capricious; (ii) application of the minimum standards to BJC's proposal which is unreasonable, arbitrary, and capricious; (iii) the offer of the counterproposal by the NFTA which constitutes discriminatory, arbitrary, and capricious action.

NFTA maintains (i) that it has not granted an exclusive right to Prior Aviation Services, Inc.; (ii) the minimum standards and its application to the BJC proposal is reasonable, relevant, and not discriminatory; (iii) BJC proposal does not meet the minimum standards; (iv) NFTA's draft operating agreement was a good faith attempt to help BJC comply with the minimum standards.

On the basis of the record in this proceeding and as discussed below, we conclude that NFTA is not in violation of the prohibition on exclusive rights, 49 U.S.C. § 40103 (e) and the corresponding grant assurances.

Minimum Standards

The FAA encourages airport sponsors to establish minimum standards for aeronautical activities for those interested parties seeking to engage in commercial aeronautical activity at the airport. Airport owners may impose conditions on users of the airport to ensure its safe and efficient operations. Such conditions must be relevant to the proposed activity, reasonably attainable, and uniformly applied. See FAA Order 5190.6A, Sec.3-12

BJC claims that the minimum standards restricting general aviation development to a certain location on the airport is arbitrary, capricious, and unreasonable. The current general aviation area is too restrictive and should be expanded to encompass the Bay 7 facility. The 1982 master plan designation separating traffic is no longer reasonable and serves as a basis for requiring BJC to make an investment in facilities that are not needed.

The segregation of airport users by function is a reasonable and relevant means of developing a consistent plan for the growth and development of the airport. The FAA recognizes local planning as the primary means for determining the needs at airports. Federal grant assistance is used frequently for the development of master plan studies. Airport master plan studies present forecasts of growth for the airport and document the facilities needed to accommodate growth. The preparation of these plans is guided by FAA Advisory Circular 150/5070-6, Airport Master Plans. Detailed recommendations for development must meet the criteria established for existing or forecast operational use. This assures that there is a documented need for the development and the development justifies a future investment of Federal funds.

Toward this objective, the consolidation and separation of general aviation, air carrier, and air cargo functional area, as part of the master plan's terminal planning criteria for commercial service airports is a recognized concept. The intent being to allow the airport to support existing airport user activities, enhance airport safety and efficiency, while at the same time allowing for growth of each function. See Advisory Circular 150/5070 Airport Master Plans.

The Airport layout Plan is a graphic presentation of existing and proposed land and facilities necessary for the operation and development of the airport. The ALP represents the final product of the airport's master planning effort that involves several steps including: coordination with airport users, the general public, FAA, state and local agencies, preplanning, requirements and financial

analysis, and public participation in the review and comment of the study results. Airport sponsors are required, (49 U.S.C. Section 47107 (a)(16), to maintain current Airport Layout Plans.

On May 22, 1995, the NFTA established Minimum Standards and Qualification for Aviation Activities to govern the operation of commercial aeronautical activities at BUF. The standards were enacted more than a year before BJC submitted its proposal. By its own admission, BJC was aware of the existence of the airport's minimum standards and that the standards require FBO facilities must be located on land leased from the NFTA and in accordance with the airport master plan.¹¹ The standards require all airport users to conform their development and use of the airport according to the airport master plan study and airport layout plan. BJC is not the only operator that has been subjected to this requirement. In an effort to consolidate general aviation activities on the north side, the NFTA instructed Prior to vacate an NFTA owned hangar on the south side. Furthermore, the record indicates that there are 11 acres available in the general aviation development area, located on the north side for the construction of BJC facilities. According to the NFTA, the segregation of aeronautical activities is substantially complete. NFTA noted that all of Prior's facilities are currently located within the general aviation development area on the north side of the airport.

Second, BJC believes the requirement that primary commercial support services must be conducted on land leased directly from the NFTA is unreasonable. NFTA requires a direct lease to protect the airport's revenue stream and maximize its control of airport commercial services. BJC believes that both of these items are better controlled by an operating agreement.

Finally, the requirement that BJC provide proof of its ability to finance the new facility is discriminatory. The NFTA requires some assurance that BJC has the ability to obtain financing for construction of the facility. The NFTA did not require Prior to provide proof when it constructed facilities under the Sale-Purchase Agreement.

Assurance 5, "Preserving Rights and Powers" provides the NFTA with the authority to plan for the development of the airport. It obligates the airport sponsor to preserve its rights, powers to carry out all grant agreement requirements, and also places certain obligations on the airport sponsor regarding land upon which Federal funds have been spent. FAA Order 5190.6A also describes responsibilities under Assurance 5 assumed by owners of public airports. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances, as are necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

¹¹ See Exhibit 1, item 5, para. 6

The sponsor has a responsibility to conduct its affairs in a manner that promotes and fosters a rates and charges structure to recover and support the cost of providing airport facilities. The record indicates Prior Aviation Services, Inc., is leasing land directly from the NFTA. BJC proposes sub-lease rental payments of \$161,500 for the first year, \$170,000 for the second year and \$178,500 for the third year. None of these payments would be made to the NFTA, but would be of beneficial value to Sierra Research. An airport sponsor is required to maintain a fee and rental structure that will make the airport as self-sustaining as possible under the circumstances existing at the airport. 49 U.S.C. § 47107(a)(13).

When the airport sponsor forgoes the charging of fees to commercial operators when it normally would do so, the airport's ability to become self-sustaining is jeopardized. For these reasons, the FAA does not consider the requirement to lease land directly from NFTA to be an unreasonable minimum standard creating a prohibited exclusive right.

Assurance 5 reinforces the NFTA rights and responsibilities to plan and allocate property according to use that reflects the interest of all users. It also provides for the airport sponsors to choose its own manner to protect its revenue stream and maximize its control of airport commercial services. This means that the sponsor can require evidence that a potential commercial operator has the resources to operate a going commercial enterprise on the airport. Additionally, Prior operated its fixed base operation under the legal instruments required by the NFTA. There is no reason why BJC should be treated any different.

BJC argues that it should not be required to relocate its facilities to the north side of the airport because this issue was never raised during negotiations. Both parties initially disputed this issue. NFTA argues that the issue was raised during negotiations and as late as the December 9 meeting.¹² While the record indicates that BJC was aware of the need to locate its facilities in the general aviation development area, the fact remains that the minimum standards requires general aviation development in a designated area. The burden rests with BJC to locate its facilities to comply with the minimum standards.

NFTA's Application of Minimum Standards

BJC argues that the requirement that it construct FBO facilities is discriminatory because the Prior lease only authorized the construction of facilities. The lease did not require construction by Prior. BJC is referring to the second agreement, the 1986 Purchase and Sale agreement executed by the NFTA and Prior. The original 1969 agreement required Prior to construct, at its own expense, an aircraft hangar at a cost of not less than \$300,000. Moreover, the 1987 lease

¹² See Exhibit 1, item 5(b) para. 32

agreement required construction of a second hangar. BJC recognized this fact in its August 19, 1996 proposal when it attempted to compare Prior's capital investment with Sierra's \$2,500,000 in improvements to its hangar.¹³ In its August 19, 1996 proposal, BJC argues

"...To interpret the "terms and conditions clause in the lease with the existing FBO (Prior) would be to grant a de facto exclusive privilege on BUF. No one could justify entering the FBO business at BUF, if it were required to invest the total amount of investment by the existing FBO."

[Exhibit 1, item 3, exhibit 8].

The NFTA is not requiring a minimum capital investment, nor is it requiring BJC to match Prior's total investment to date. What it is requiring is that BJC provide comparable facilities and equipment using the Prior's original investment as a basis for BJC facility development. This requirement cannot be said to unjustly discriminate against BJC.

BJC raises a number of objections to the 11-acre site. The first issue concerns the cost of constructing a ramp. The NFTA admitted that it did not have funds currently budgeted for ramp construction; but indicated a willingness to examine the availability of funding for ramp construction. As NFTA pointed out in its rebuttal, the issue could also have been addressed through reductions in ground lease or other fees payable to the NFTA. FAA Order 5190.6A states in pertinent part:

"In respect to a contractual commitment, a sponsor may charge different rates to similar users of the airport if the differences can be justified, as nondiscriminatory and such charges are substantially comparable. These conclusions must be based upon the facts and circumstances involved in every case."

See 5190.6A para. 4-14(d)(1)(c)

Second, the location of the Prior de-icing tent is within the NFTA's authority to change. The license agreement authorizing the construction of the de-icing tent gives the NFTA the authority to have Prior relocate the tent. BJC expressed concerns that the 11-acre site in the general aviation development area might be environmentally contaminated. According to NFTA, the site is being used for bioremediation. It agreed to provide BJC with documentation prior to construction and have the New York State Department of Environmental Conservation provide clearance that the site is not contaminated as a result of the bioremediation efforts.

¹³ See Exhibit 1, item 3(B), exhibit 8, Section XIII

In summary, NFTA indicated a willingness and ability to address each of these concerns in further negotiations with BJC. Moreover, BJC's concerns are of the kind that are normally addressed through lease negotiations. There is no evidence that BJC ever brought its concerns to the attention of the NFTA before filing the Part 16 complaint. The FAA is not prepared to find that NFTA's failure to address these concerns constitutes a violation of the grant assurances when BJC forecloses that possibility by filing the Part 16 complaint. The Part 16 process is intended to protect the public interest in the Federal investment in airports. It is not intended as a device to promote the private interests of a party in commercial negotiations.

BJC argues that the restriction against subleases is arbitrary, capricious, and unreasonable. The provision requiring BJC to vacate the Sierra Bay 7 leasehold within three years is discriminatory. Prior used the same facility for 9 years despite provisions in the minimum standards or the Airport Layout Plan. BJC claims that NFTA's entry into the 1987 sublease agreement allowing Prior to use the Sierra Bay 7 facility for its FBO business constitutes a waiver and amendment of the ALP, such as to allow BJC to use the same facility for the same purposes.

NFTA's decision to require BJC to vacate the hangar within three year is a reasonable requirement to ensure BJC's compliance with the minimum standards. It permits the complainant to commence operations with the understanding and recognition that an FBO facility must be constructed in the general aviation development area on the north side of the airport. To compare Prior's use of Bay 7 to BJC's proposed use would be an unfair comparison. Prior's use of the facility was primarily restricted to aircraft storage. All of the other essential primary commercial services were performed at Prior facilities on land leased directly from the NFTA. BJC's proposed use would provide its primary commercial services on property leased by another. BJC would have the unfair advantage of not having to make a comparable investment that was required of Prior in its 1969 agreement with the NFTA.

Furthermore, Prior's use of Bay 7 for aircraft storage does not constitute a waiver or an amendment of the ALP. The NFTA permitted Prior's use of Bay 7 on an interim basis for the storage of aircraft. It was never intended to be used by the NFTA for FBO facilities. According to the NFTA, the Sierra facility area is very constrained and cannot be expanded. Sufficient space exists on the north side of the airport for general aviation development and expansion. Airport sponsors have the right to plan and develop their airport. NFTA has decided to locate general aviation activity on the north side of the airport.

NFTA's Counterproposal

The NFTA has a right to reject the BJC proposal. The burden for complying with the minimum standards is on the BJC. The proposal failed when the complainant failed to address the requirements of the minimum standards. The NFTA used the Prior lease as the model for the draft agreement. It incorporated the compensation terms previously agreed upon by BJC. More importantly, it provided BJC an opportunity to commence FBO operations in a timely fashion with the understanding that BJC must construct and operate an FBO facility in the designated area in a period not to exceed three years.

BJC wanted the NFTA to provide physical dimensions and size for the facilities that BJC must construct. Industry practice normally leaves these decisions to the commercial operator based on its planned activity levels. NFTA was not asking BJC to do anything that it had not required of Prior when it constructed its facilities.

Exclusive Rights Allegation

BJC alleges that by rejecting its proposal, the NFTA has given Prior an exclusive right for each fiscal year 1986 through 1997. The NFTA denies that it has granted Prior an exclusive right at the airport.

The statutory provision, § 40103(e) provides that , "A person does not have an exclusive right to use an airport on which Government money has been expended. Assurance 23, "Exclusive Rights", prohibits the NFTA from either directly or indirectly granting or permitting any person, firm or corporation the exclusive right at the airport to conduct any aeronautical activities

BJC alleges that the violation took place during the period 1986 through 1997. However, BJC did not submit its proposal to the NFTA for the operation of an FBO until August 19, 1996. BJC provides no evidence that NFTA violated the exclusive rights provision for the period 1986 through 1996 other than the fact that Prior operated as the only FBO on the airport. FAA policy is clear, the existence of one FBO, in and of itself, is insufficient to warrant a violation of the exclusive rights provision.

The FAA's policy position on exclusive rights states,

"The presence on an airport of only one enterprise engaged in any aeronautical activity will not be considered a violation of this policy if there is no understanding, commitment, express agreement, or

apparent intent to exclude other reasonably qualified enterprises."

FAA Order 5190.6A para. 3-9(a).

BJC offered no evidence suggesting that the NFTA refused to consider a proposal from a qualified FBO during the period from 1986 to 1996. Similarly, the NFTA's refusal to accept BJC's original proposal does not constitute the grant of a prohibited exclusive right.

The owner of an airport developed with Federal grant assistance is required to operate it for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms and without unjust discrimination. NFTA developed minimum standards for the conduct of commercial aeronautical activity. These standards are relevant to the services required and easily attainable evidenced by the fact that Prior has complied with the requirements. BJC chose not to submit its proposal in compliance with the minimum standards and instead of continuing negotiations to provide service at the airport, it filed a complaint.

BJC failed to submit a timely and acceptable proposal to the NFTA that addressed the requirements of the minimum standards regarding: (1) locating its operation in accordance with the airport master plan; (2) providing service on land leased directly from the NFTA; (3) providing an aircraft maintenance service plan services provided. Prior complied with the later two requirements when it signed an agreement with the NFTA in 1969. In 1986, Prior complied with the first requirement when it agreed to locate its facilities in accordance with the airport master plan. BJC's failure to comply with the minimum standards does not constitute a violation of the exclusive rights provision by the NFTA.

BJC's failure to submit a timely and qualified proposal can be attributed to its failure to comply with the airport's minimum standards. Since the standards and their application to BJC were not unreasonable or unjustly discriminatory, the denial of the lease based on noncompliance with the minimum standards cannot be considered the grant of a prohibited exclusive right¹⁴.

ACCORDINGLY, the FAA does not find the Niagara Frontier Transportation Authority to be in violation of Federal law or the it's Federal grant obligations. The complaint is **DISMISSED**.

¹⁴ Since no violation exists, FAA will not consider possible conflict of interest -beyond FAA's authority.

RIGHT OF APPEAL

This Director's determination is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. 14 CFR 16.247(b)(2). A party adversely affected by the Director's determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's determination.



David L. Bennett
Director, Office of Airport
Safety and Standards

Date 8/19/98